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The Strange Career of Commercial Speech

*Earl M. Maltz**

I. INTRODUCTION

The evolution of the constitutional doctrine of commercial speech[1] is unique among economic rights. Throughout our constitutional history, conservative justices on the Supreme Court have been the guardians of expansive reading of the Takings Clause,[2] the Contracts Clause,[3] and economic substantive due process generally.[4] When judicial restraint has been the hallmark of conservative jurisprudence, the scope of these rights has been greatly diminished.

The course of the development of commercial speech doctrine has been quite different. The initial impetus for the strong constitutional protection of commercial speech came from the more liberal members of the Burger Court. During this period, the more conservative justices sought to either limit that protection or exclude regulations of commercial speech from First Amendment[5] protection altogether. In the last decade, by contrast, the dynamic has become more complicated. While voting patterns have not been entirely uniform, the conservative members of the Court have become the more vigorous champions of commercial speech.

This article will discuss and analyze the changing dynamic of the Court's commercial speech jurisprudence. It will begin with a brief overview of the development of commercial speech doctrine generally, focusing particularly on the problems associated with advertisements of socially undesirable products. Using the changing views of Chief Justice William H. Rehnquist as an exemplar, this article will then examine the evolution of the conservative approach to commercial speech cases. Finally, it will situate the

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1 While the Court has not clearly defined commercial speech, it has noted that an advertisement for a specific product, motivated by the economic interest of the speaker, is almost certainly commercial speech. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

2 U.S. CONST. amend. V.

3 *Id.* art. 1, § 10, cl. 1.

4 *Id.* amend. XIV, § 1.

5 *Id.* amend. I.

changing dynamic of commercial speech doctrine in the more general evolution of conservative constitutional jurisprudence.

II. An Overview of Commercial Speech

At the time Warren Burger was appointed Chief Justice,[6] the decision in *Valentine v. Chrestensen*[7] was generally viewed as having established the rule that the First Amendment did not impose any significant restrictions on government regulation of commercial speech.[8] Indeed, constitutional challenges to such restrictions often were not conceptualized in First Amendment terms at all. *Williamson v. Lee Optical Co.*[9] is a classic example from the Warren era.[10] *Lee Optical* involved a constitutional challenge to a state prohibition on the advertisement of eyeglass frames.[11] Viewing the claim in substantive due process terms, the Court unanimously rejected the challenge, applying the most lenient version of the rational basis test.[12]

By the mid-1970s, however, two quite different developments combined to undermine the continued vitality of the *Valentine* principles. The first of these developments was a change in the political climate surrounding limitations on commercial speech. At the time they were adopted, regulations such as those challenged in *Lee Optical* were seen as serving the public interest by enhancing professionalism and preventing inappropriate competition. However, as the twentieth century progressed, regulations like those in *Lee Optical* were increasingly viewed as devices by which special interests shielded themselves from the rigors of the marketplace, thereby depriving the public of the benefits of competition.

The second development was doctrinal. During the Warren era, the liberal justices had developed an increasingly libertarian view of free speech.[13] In particular, these justices evinced an increasing hostility to the exclusion of specific categories of speech

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6 Chief Justice Warren E. Burger was sworn into the Court on June 23, 1969, and retired on September 26, 1986.

7 316 U.S. 52 (1942).

8 Robert E. Riggs, *The Burger Court and Individual Rights: Commercial Speech as a Case Study*, 21 Santa Clara L. Rev. 957, 971 (1981) (surveying the early development of the law of commercial speech).

9 348 U.S. 483 (1955) (upholding an Oklahoma statute prohibiting the advertising or sale of eyeglass frames and lenses without a prescription).

10 Chief Justice Earl Warren was sworn into the Court on October 5, 1953, and retired on June 23, 1969.

11 348 U.S. at 484–85.

12 *Id.* at 491. Under rational basis review, the challenged classification must be rationally related to a legitimate government purpose. Laws evaluated under this level of review are presumptively constitutional.

13 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (extending constitutional protection to defamatory speech directed at government officials).

from First Amendment protections.[14] A blanket exception allowing government regulation of commercial speech ran counter to this trend.

These themes came together in the watershed decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[15] In that case, with only Justice Rehnquist dissenting, the Court invalidated a state statute that prohibited pharmacists from advertising the prices they charged for prescription drugs.[16] Writing for the Court, Justice Blackmun first observed that in other contexts, the First Amendment had been held to protect speech that is carried in a form that is sold for profit.[17] The only question remaining, therefore, was whether purely commercial speech was entitled to First Amendment protection. In concluding that the First Amendment did protect the advertising in *Virginia Pharmacy*, Justice Blackmun focused primarily on the interest of the consumer in receiving product information, declaring:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[18]

He sounded a similar theme in rejecting the claim that the prohibition was necessary to preserve the professionalism of pharmacists and to protect the public from those who would offer inferior service at low prices:

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . [T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.[19]

Virginia Pharmacy clearly sounded the death knell for the theory that commercial speech lacked all First Amendment pro-

14 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447, 449 (1969) (holding that a Ku Klux Klan leader's racist remarks were protected by the First Amendment unless intended to incite imminent unlawful acts and likely to do so).

15 425 U.S. 748 (1976).

16 *Id.* at 773.

17 *Id.* at 761.

18 *Id.* at 765.

19 *Id.* at 770.

tection. However, the majority also suggested that states might have wider latitude to regulate commercial speech than other types of communication, specifically noting that states could take steps to suppress false or misleading commercial advertising.[20] Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[21] the Court established a four prong standard of review for regulations of commercial speech:

> For commercial speech to come within [the protection of the First Amendment] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[22]

In the wake of *Virginia Pharmacy* and *Central Hudson*, the Burger Court was often sympathetic to First Amendment challenges to restrictions on commercial speech. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[23] was a prominent exception. *Posadas* involved a dispute over the application of the *Central Hudson* test to a Puerto Rican statute that prohibited local casinos from advertising their facilities to residents of Puerto Rico.[24] A closely-divided Court rejected a First Amendment challenge to this restriction.[25] The majority opinion began by arguing that the Puerto Rican government had a substantial interest in limiting demand for gambling among its citizens and that the inhibition on advertising directly served that interest.[26] The majority then rejected claims that the legislature could serve its interest without restricting speech by either financing a counter-advertising campaign or banning casino gambling altogether. The Court asserted, "[w]e think it is up to the legislature to decide whether or not . . . a 'counterspeech' policy would be as effective in reducing the demand for casino gambling"[27] and observed that "it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."[28] Noting that government regulation of socially undesirable prod-

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20 *Id.* at 771.

21 447 U.S. 557 (1980) (striking down as overly restrictive a state's ban on an electrical utility's promotional advertising).

22 *Id.* at 566.

23 478 U.S. 328 (1986); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (allowing states to limit in-person solicitation by attorneys).

24 *Id.* at 332–33.

25 *Id.* at 344.

26 *Id.* at 341–42.

27 *Id.* at 344.

28 *Id.* at 346 (emphasis in original).

ucts had historically ranged from outright prohibition to restrictions on the stimulation of demand, the Court likened the regulation in *Posadas* to limitations on the promotion of alcohol and tobacco, and concluded that "[t]o rule out the latter, intermediate kind of response [reflected in the restriction on advertising] would require more than we find in the First Amendment."[29]

Posadas was the high water mark of attempts to limit the scope of the protection for commercial speech in the post-*Virginia Pharmacy* era. However, its vitality as precedent proved fleeting. The process of eroding the authority of *Posadas* began in 1995, with the decision in *Rubin v. Coors Brewing Co.*[30] *Rubin* was a challenge to the constitutionality of a provision of the Federal Alcohol Administration Act that prohibited beer labels from displaying alcohol content.[31] A unanimous Supreme Court held that this provision violated the First Amendment.[32] In defending the statute, the federal government argued that the restriction was justified by the need to prevent beer manufacturers from engaging in "strength wars"—competition in the beer market on the basis of the alcoholic content.[33] Such a competition, the government reasoned, would lead to an increase in alcoholism and its attendant social costs.[34] Writing for the Court, Justice Clarence Thomas conceded that this interest was sufficiently weighty to satisfy the second prong of the *Central Hudson* analysis.[35] However, noting that the other aspects of the regulatory scheme allowed, and in some cases required, manufacturers to indicate the strength of alcoholic beverages, Justice Thomas contended that "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve [the purpose of curtailing strength wars]."[36] He also argued that the government could have adopted less intrusive means to achieve this goal.[37] Thus, he concluded that the labeling ban failed to satisfy both the third and fourth prongs of *Central Hudson*.[38]

Given that the holding in *Rubin* was, at least on its face, based on the idiosyncrasies of the Federal Alcohol Administration Act,[39] Justice Thomas did not feel constrained to make more than a passing reference to *Posadas*.[40] However, the following year,

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29 *Id.* at 347.
30 514 U.S. 476 (1995).
31 *Id.* at 480–81.
32 *Id.* at 491.
33 *Id.* at 483.
34 *Id.* at 485.
35 *Id.*
36 *Id.* at 489.
37 *Id.* at 491.
38 *Id.* at 490–91.
39 *Id.* at 491.
40 *Id.* at 485.

Posadas met its demise in *44 Liquormart, Inc. v. Rhode Island*.[41] *44 Liquormart* was a challenge to a pair of Rhode Island statutes that, taken together, essentially prohibited advertising the prices of alcoholic beverages.[42] The state asserted that the limitations were justified as a means of limiting the demand for alcoholic beverages—an interest that the Court once again conceded was sufficiently weighty to satisfy the second prong of the *Central Hudson* analysis.[43] Against this background, eight justices agreed that the case was analogous to *Posadas*. Nonetheless, the justices unanimously held that the Rhode Island statutes were unconstitutional, overruling *Posadas*.[44] While disagreeing on the precise standard of review to be applied to the Rhode Island statutes, all of the justices concluded that the Court should not defer to the state's claim that its regulations directly furthered the asserted interest and that the statutes were no more restrictive than necessary to serve that interest.[45] Instead, the Court conducted a more searching inquiry and determined that the ban on price advertising unduly restricted the First Amendment rights of the beer merchants.[46]

In 2001, the principles underlying the decision in *44 Liquormart* were reiterated and strengthened in *Lorillard Tobacco Co. v. Reilly*.[47] In *Lorillard*, the Court was faced with a First Amendment challenge to Massachusetts regulations that prohibited all outdoor advertising of tobacco products within 1,000 feet of any school or playground. The statutes also prohibited point of sale advertising of such products placed lower than five feet from the ground within that same radius.[48] The majority conceded that "'tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States'"[49] and that there was clear evidence of a link between advertising and an increase in the use of tobacco products by young people.[50] Thus, the majority concluded that the restrictions on outdoor advertisements at least passed muster under the third prong of the *Central Hudson* analysis.[51] Nonetheless, a deeply divided Court struck down both regulations, with the majority observing that in some urban areas the regulations would ban virtually all outdoor advertisements of tobacco products. The

41 517 U.S. 484 (1996).
42 *Id.* at 489.
43 *Id.* at 504.
44 *Id.* at 489, 509–10.
45 *Id.* at 507, 516.
46 *Id.* at 507–08, 516.
47 533 U.S. 525 (2001).
48 *Id.* at 534–35.
49 *Id.* at 570 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000)).
50 *Id.* at 561.
51 *Id.*

majority faulted the state Attorney General for failing to make "a careful calculation of the speech interests involved [in the advertising ban]."[52]

III. The Dynamic of Commercial Speech Jurisprudence

On one level, the evolution of the law from *Virginia Pharmacy* through *Central Hudson* and *Posadas* to *44 Liquormart* and *Lorillard* is a fairly prosaic story. When the Court breaks new ground, as it did in *Virginia Pharmacy*, it is not unusual for there to be some hesitancy and even reversal of course before the doctrinal analysis takes on a firm, lasting structure. In the case of commercial speech doctrine, however, the evolution of the Court's approach was accompanied by a dramatic ideological shift. Initially, the rejection of the *Valentine* analysis was a product of liberal constitutional jurisprudence, with conservatives being far more likely to accept limitations on commercial speech, particularly in cases involving the regulation of attorney advertising. The conservative justices have generally remained skeptical of First Amendment challenges to the regulation of advertising by attorneys.[53] More recently, however, the conservatives on the Court have emerged as champions of robust protection for commercial speech—not only in *Lorillard*, but also in other cases involving advertising[54] and cases challenging the constitutionality of government-mandated contributions for the promotion of specific products.[55] By contrast, outside of the area of attorney advertising,[56] the more liberal members of the Court now generally oppose the expansion of protection for commercial speech.

A. The Views of Chief Justice Rehnquist

The changed political dynamic of the Court in commercial speech cases can be traced through the evolution of Chief Justice Rehnquist's approach to the issue.[57] In 1976, then-Justice Rehnquist's views were seen as epitomizing conservative jurisprudence. He also stood alone in rejecting the result in *Virginia Pharmacy*.[58] Analogizing the commercial speech issue to more general problems of substantive due process, Rehnquist attacked the rea-

52 *Id.* at 562.

53 *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

54 *See, e.g.*, Edenfield v. Fane, 507 U.S. 761 (1993) (striking down a state statute prohibiting in-person solicitation by certified public accountants).

55 *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001).

56 *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a Florida bar rule prohibiting direct solicitation of prospective personal injury clients within thirty days of their accident).

57 Justice William H. Rehnquist was sworn in on January 7, 1972 as an Associate Justice of the Supreme Court. He was elevated to Chief Justice on September 26, 1986.

58 425 U.S. 748, 790 (1976) (Rehnquist, J., dissenting) (citation omitted).

soning of the majority in language that echoed Oliver Wendell Holmes' famous statement, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics":[59]

> The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the [government] to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.[60]

Rehnquist's dissents in cases such as *Bates v. State Bar of Arizona*[61] and *Central Hudson* sounded similar themes. In *Bates*, the Court held that the same principle underlying the holding in *Virginia Pharmacy* required states to allow attorneys to advertise their fees for routine legal services.[62] The three most conservative members of the *Virginia Pharmacy* majority dissented in *Bates*,[63] insisting that legal services could not be standardized in the same manner as pharmaceuticals and that stringent limitations on advertising were justified as a means of preserving the professionalism of lawyers.[64] Rehnquist, while agreeing with these observations, went further and reiterated his objections to *Virginia Pharmacy* asserting that "once the Court took the first step down the 'slippery slope' in *Virginia Pharmacy Board* the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated."[65] Dissenting in *Central Hudson* three years later, Rehnquist reiterated his view that "the Court unlocked a Pandora's Box when it 'elevated' commercial speech . . . by according it First Amendment protection in *Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel*."[66] He found the holding in *Central Hudson* particularly offensive, contending that "New York's order . . . is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court"[67] and that "by labeling economic regulation of business conduct as a restraint on 'free speech,' [the Court has] gone far to

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59 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

60 *Virginia Pharmacy*, 425 U.S. at 783–84 (Rehnquist, J., dissenting) (citation omitted).

61 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting).

62 *Id.* at 384.

63 Chief Justice Burger, Justice Stewart, and Justice Powell.

64 *Bates*, 433 U.S. at 386–88 (Burger, C.J., concurring in part and dissenting in part); *id.* at 389–405 (Powell, J., concurring in part and dissenting in part).

65 *Id.* at 405 (Rehnquist, J., dissenting in part).

66 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (citation omitted).

67 *Id.* at 591.

resurrect the discredited doctrine of cases such as *Lochner* . . . ."[68] Not surprisingly, Rehnquist was also the author of the majority opinion in *Posadas*.[69]

However, by 1995, Rehnquist's position had shifted significantly. He joined the majority opinion in *Rubin* where eight justices applied the *Central Hudson* test to strike down a federal statute prohibiting the truthful display of alcoholic content on beer labels.[70] In *44 Liquormart*, Rehnquist joined an opinion by Justice Sandra Day O'Connor—the only other justice remaining from the *Posadas* majority—that, like *Rubin*, rejected the deference shown by the Court in the *Posadas* case, in favor of *Central Hudson*'s requirement that the government "show that the speech restriction directly advances its interest and is narrowly tailored."[71] O'Connor's opinion in *44 Liquormart* concluded that the state had failed to carry its burden of proof.[72] Finally, in 2001, Rehnquist cast a critical vote in support of the majority opinion in *Lorillard*.

Rehnquist's new-found affinity for the protection of commercial speech extends beyond the *Rubin/Lorillard* line of cases. For example, in *Glickman v. Wileman Bros. & Elliott, Inc.*[73] and *United States v. United Foods, Inc.*,[74] he concluded that the government could not compel producers of agricultural products to pay assessments that funded generic advertising of those products.[75] Admittedly, Rehnquist is not as zealous in protecting commercial speech as Justices Scalia and Thomas.[76] Nonetheless, from a jurisprudential perspective, his approach to commercial speech cases has clearly changed dramatically since 1986.

B. Commercial Speech and the Evolution of Conservative Jurisprudence

Chief Justice Rehnquist's changed approach to commercial speech reflects the evolution of conservative constitutional jurisprudence more generally in the late twentieth century. Even in 1976, at a purely political level, conservatives were more likely to be strong supporters of property rights and opponents of govern-

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68 *Id.*

69 478 U.S. 328, 331 (1986).

70 Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).

71 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 532 (1996) (O'Connor, J., concurring in the judgment).

72 *Id.*

73 521 U.S. 457 (1997).

74 533 U.S. 405 (2001).

75 *Glickman*, 521 U.S. at 477–78 (Rehnquist, C.J., joining opinion of Souter, J., dissenting); *United Foods*, 533 U.S. at 416.

76 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (Rehnquist, C.J., joining opinion of Breyer, J., dissenting).

ment regulation of the economy.[77] However, during this period, conservatives denounced nonoriginalist judicial activism in general as undemocratic and illegitimate, and often argued that the courts should generally defer to the decisions of other branches of government. For example, in 1976, Rehnquist himself asserted:

> To the extent that [nonoriginalist judicial review] makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution . . . [it] is genuinely corrosive of the fundamental values of our democratic society.[78]

Even during the Burger era, Rehnquist and the other more conservative members of the Supreme Court did not entirely eschew judicial activism. For example, Rehnquist was a leader in the efforts to revivify both the Contracts Clause[79] and the Takings Clause[80] as significant restrictions on government action. Nonetheless, the philosophy of deference reflected in Rehnquist's early commercial speech opinions was plainly an important theme not only of his personal approach to constitutional adjudication, but also of conservative constitutional jurisprudence generally from the 1960s through at least the end of the Burger era.[81]

Conversely, the activism apparent in Rehnquist's current approach to commercial speech mirrors the increasingly activist tone of conservative jurisprudence that has marked his tenure as Chief Justice. Indeed, in some respects, commercial speech decisions are a better measure of the scope of changes in conservative jurisprudence than other, more widely discussed cases. When the Court is called upon to adjudicate cases that involve core ideological beliefs or have clear political ramifications, even justices with a strong commitment to judicial deference may find their resolve weakening. For example, one cannot draw accurate conclusions about the basic jurisprudential philosophy of the justices of the Taney Court from their positions in *Dred Scott v. Sandford*.[82] Similarly, taken alone, the activist posture of the conservative justices in cases such as *Bush v. Gore*,[83] the affirmative action cases,[84]

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77 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138–53 (1978) (Rehnquist, J., dissenting).

78 William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976).

79 *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977).

80 *See, e.g.*, *Penn Cent.*, 438 U.S. at 138–53 (Rehnquist, J., dissenting).

81 Justice William H. Rehnquist was sworn in as Chief Justice on September 26, 1986, replacing Chief Justice Warren E. Burger.

82 60 U.S. (19 How.) 393 (1856).

83 531 U.S. 98 (2000) (per curiam).

84 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

or the campaign finance cases[85] could be seen as reflecting idiosyncratic political pressures, rather than indicating their wholesale abandonment of judicial restraint.

The new, aggressive activist position taken by conservative justices in commercial speech cases stands on a different footing from the higher profile political cases. To be sure, some of the commercial speech decisions have important political overtones. For example, the decision in *Lorillard* can plausibly be viewed as simply a skirmish in the long-running legislative and judicial battle over the regulation of tobacco use and advertising. Even so, the political stakes in *Lorillard* were by no means as high as those involved in *Gore*, the affirmative action cases, or the campaign finance decisions. Moreover, it is difficult to conceive of a more prosaic issue than that involved in *United Foods*, wherein Chief Justice Rehnquist and Justices Scalia and Thomas formed the core of the majority concluding that mushroom farmers could not be required to contribute to a fund for advertising mushrooms.[86] While the conservatives on the Court were obviously moved by a general distaste for government coercion of private economic actors, one can hardly imagine a case where the implications for the political and economic system were less consequential. In short, the position of the conservative justices in cases such as *United Foods* is inconsistent with any meaningful commitment to the concept of judicial restraint.

IV. Conclusion

This account of the evolution of commercial speech doctrine highlights the changing dynamic of modern constitutional adjudication. This dynamic is substantially different from that which prevailed for most of the twentieth century, when a significant number of justices generally embraced judicial restraint as an important value in constitutional analysis. For much of the century, liberal justices consistently espoused deference to other branches of government to oppose conservative judicial activism. In the latter part of the twentieth century, by contrast, it was conservatives who raised the banner of restraint as a response to the jurisprudence of the Warren Court and its successors. While conservative commitment to restraint was never complete, it nonetheless clearly influenced the decisions and approaches of some members of the Court during this period.

85 *See, e.g.*, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 626–31 (1996) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 631–48 (Thomas, J., concurring in the judgment and dissenting in part); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985).

86 533 U.S. 405, 413 (2001).

While both conservatives and liberals continue to accuse each other of undue judicial activism, it seems clear that arguments based on restraint have become purely tactical. Thus, in the commercial speech context, the more liberal justices have no problem voting to strike down virtually all restrictions on attorney advertising,[87] while the conservatives choose to impose stringent limitations on the ability of the states to regulate the advertising of tobacco.[88] The triumph of the activists is thus complete; the only remaining question is which side will ultimately benefit from a regime in which the concept of judicial restraint is now viewed as obsolete. Only one thing is certain: our system of government will be the loser.[89]

87 *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (arguing in favor of allowing attorneys to solicit accident victims by letter without regard to any thirty day waiting period).

88 *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring) (arguing that the *Central Hudson* test gives "insufficient protection to truthful, nonmisleading commercial speech"); *id.* at 572–90 (Thomas, J., concurring in part and concurring in the judgment) (arguing for application of strict scrutiny to government regulation of truthful commercial speech).

89 See EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994) for a more detailed description of the views presented in this paper.